BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LINDA LORENZ and ED LORENZ,
Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

GREGG E. MILLER,
Intervenor-Respondent.

LUBA No. 2003-123

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Ken Brinich, Bend, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hendrix Brinich & Bertalan, LLP.

Laurie Craghead, Assistant County Counsel, Bend, filed a response brief and argued on behalf of respondent.

Dan Van Vactor, Bend, filed a response brief and argued on behalf of intervenor-respondent.

HOLSTUN, Board Member, BASSHAM, Board Chair; BRIGGS, Board Member; participated in the decision.

AFFIRMED 11/19/2003

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision that grants landscape management review approval for 29 greenhouses and related improvements.

FACTS

The subject property includes 27.4 acres and is located in the county's Multiple Use Agricultural (MUA) zone. The property is also subject to a county Landscape Management Combining Zone, which requires the county review that led to the decision that is at issue in this appeal.

Intervenor, the applicant below, plans to construct twenty-nine 2000 square foot greenhouses and several shaded holding areas for plant material and establish a wholesale nursery on the subject property.[1] In the future, intervenor plans to utilize the part of the property that will not be occupied by the proposed greenhouses and holding areas for "field grown trees and shrubs" and for "nursery production." Record 58. A portion of the subject property is currently used to grow hay. Over time, intervenor plans to convert those existing hay fields to nursery production. *Id.*

Intervenor's application for landscape management review approval was granted administratively by the county planning division. Petitioners appealed that decision to the county hearings officer who, after holding an evidentiary hearing, affirmed the planning division's decision. The board of county commissioners declined to consider petitioners' local appeal of the hearings officer's decision, and this appeal followed.

[1] There apparently was some confusion below regarding whether intervenor planned to relocate his existing retail nursery from the City of Bend to the subject property. That apparently is not the case, and the challenged decision does not approve use of the greenhouses for a retail nursery. Record 49 n 2.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Deschutes County Code (DCC) 18.32.020 lists "agricultural uses" and "accessory uses" among the permitted uses in the MUA zone.[2] During the local proceedings, the hearings officer considered whether the proposed greenhouses are properly viewed as an "accessory use" to "agricultural use" of the property.[3]

> "The application materials indicate that the subject property is currently being used for hay production and the growing and selling of nursery stock (trees and shrubs). According to the applicant, the greenhouses are essential for the propagation of nursery stock, flowers and plants in this climate and are proposed solely as an accessory use to the existing nursery operation. At the hearing, the applicant specifically testified that the greenhouses would be used solely for the propagation of nursery stock and that he would agree to a condition of approval to that effect. The applicant further testified that the property would continue to be used for hay production and nursery stock and, as shown on the site plan, the hay fields would gradually be replaced with nursery stock, including field grown trees and shrubs.
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> "Based on the evidence in the record, the Hearings Officer finds the existing hay and nursery stock production operation is an agricultural use as defined in DCC 18.04.030 because the applicant is using the property for the raising, harvesting and selling of hay and nursery stock. The Hearings Officer further finds that the proposed greenhouses are accessory structures, as defined in DCC 18.04.030, because the greenhouses are necessary to protect the nursery stock in this climate and [are] incidental to the nursery stock production. The

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[2] As relevant, DCC 18.32.020 provides:

> "The following uses and their *accessory uses* are permitted outright:
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> "A. *Agricultural uses* as defined in DCC Title 18." (Emphases added.)

[3] As relevant, DCC 18.04.030 sets out the following definitions of "accessory use or structure" and "agricultural use:"

> "'Accessory use or accessory structure' means a use or structure incidental and subordinate to the main use of the property, and located on the same lot as the main use. * * *"
>
> "'Agricultural use' means any use of land, whether for profit or not, related to raising, harvesting and selling crops * * * or any other agricultural or *horticultural* use or animal husbandry or any combination thereof not specifically covered elsewhere in the applicable zone. Agricultural use includes the preparation and storage of the products raised on such land for human and animal use and disposal by marketing or otherwise. * * *" (Emphasis added.)

> proposed greenhouses clearly would not be useful without the nursery stock and the record shows that they are incidental to or subordinate to the main use of the property.
>
> "* * * * *
>
> "Finally, the idea that not all of the nursery stock is started from seed does not transform the existing nursery and hay operation from an agricultural use to a commercial use. The definition of agricultural use is broad including 'any use of land…related to raising, harvesting, and selling crops…or any other agricultural or horticultural use….' DCC 18.04.030. Previous Hearings Officer and Board [of County Commissioners] decisions have found that a nursery operation is an agricultural use or farm use as defined in DCC 18.04.030 and the state statutes. * * *" Record 48-49.

A. Current Nursery Stock Production

Petitioners first argue that the hearings officer's findings that nursery stock is currently being grown on the subject property are erroneous. The only agricultural activity currently being conducted on the property is hay production. Petitioners argue the erroneous findings are not harmless, because the hearings officer's theory for why the greenhouses may be constructed on the subject property is that they are accessory to the "existing nursery stock production." Petition for Review 8.

The hearings officer's erroneous finding is harmless. Petitioners make no attempt to explain why the planned nursery stock production must be in place *before* the accessory greenhouses may be approved. We see nothing in the DCC that would mandate that the planned nursery stock production must precede approval of the greenhouses. The hearings officer's decision is based on her understanding that the greenhouses are to be used in conjunction with growing nursery stock on the property.[4] Her erroneous belief that nursery stock is already being grown on the property provides no basis for remand.

[4] The hearings officer also noted that some of the nursery stock that will be propagated in the greenhouses would be purchased from off-site locations.

B. Commercial Activity in Conjunction with Farm Use

Petitioners next argue that the proposed wholesale nursery is not correctly viewed as an outright permitted "agricultural use.' Rather, petitioners contend, it is a commercial activity in conjunction with farm use that requires conditional use approval and the hearings officer erred in finding otherwise.[5] Petitioners point out that the DCC 18.04.030 definition of "agricultural use" explicitly excludes uses that are "specifically covered elsewhere in the applicable zone." *See* n 3. Petitioners contend that intervenor's planned nursery is specifically covered elsewhere in the MUA zone as a "commercial activit[y] in conjunction with farm use." Petitioners argue the hearings officer erred in failing to attach a condition of approval requiring that intervenor seek and receive conditional use approval for the proposed greenhouses and wholesale nursery.

1. Waiver

As we have noted, one of the disputed issues below was whether the proposed greenhouses were to be used in conjunction with a retail nursery on the subject property. Intervenor concedes that a retail nursery would require conditional use approval in the MUA zone. However, intevenor clarified below that his Bend retail nursery was not being relocated to the subject property and that the nursery operation on the subject property would be limited to a wholesale operation and would not be open to the public. The hearings officer's decision to grant landscape management review approval is based in part on

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[5] DCC 18.32.030 lists the conditional uses that may be approved in the MUA zone. As relevant, it provides:

> "The following uses may be allowed subject to [county regulations concerning conditional uses at] DCC 18.128:
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> "* * * * *
>
> "C. Commercial activities in conjunction with farm use. The commercial activity shall be associated with a farm use occurring on the parcel where the commercial use is proposed. The commercial activity may use, process, store or market farm products produced in Deschutes County or an adjoining County."

intervenor's representation that the nursery would be limited to a wholesale operation and would not be open to the public. However, we understand petitioner to argue that without regard to whether the nursery is a retail or wholesale operation, it is a commercial activity in conjunction with farm use that requires conditional use approval under DCC 18.32.030 and 18.128. *See* n 5.

Intervenor contends that petitioners waived their right to argue in this appeal that a wholesale nursery is not an agricultural use. ORS 197.763(1); 197.835(3).[6] Intervenor contends that petitioners' argument below was that a "retail/commercial nursery" must be viewed as a commercial activity in conjunction with farm use. Petition for Reviw 9. According to intervenor, that argument was insufficient to raise any issue concerning the *wholesale* nursery that intervenor actually proposes to develop on the property. We do not agree that the issue that petitioners raised locally was limited to retail nurseries. Record 35. Petitioners took the position in their local appeal application that the nursery and greenhouses are a "commercial" use, and included no reference to "retail" or "wholesale." Record 35. We reject intervenor's waiver argument. *See Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991) (ORS 197.763(1) "requires no more than fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts").

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[6] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) expressly limits LUBA's scope of review as follows:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS * * * 197.763 * * *."

2. The Hearings Officer's Interpretation

While it might be possible to construe DCC 18.32.020 and DCC 18.32.030 to provide that a wholesale nursery is a commercial activity in conjunction with farm use rather than a "agricultural use," the hearings officer's contrary interpretation is at least equally consistent with the text of DCC 18.32.020 and DCC 18.32.030 and the definition of "agricultural use" at DCC 18.04.030. As the hearings officer correctly notes, the DCC 18.04.030 definition of "agricultural use" expressly includes "horticultural use." Although DCC 18.04.030 does not include a definition of "horticultural use," the hearings officer's conclusion that intervenor's proposed wholesale nursery is properly viewed as a horticultural use is consistent with the generally understood meaning of "horticulture."[7] Similarly, we see no error in the hearings officer's conclusion that the greenhouses are properly viewed as accessory uses to the planned horticultural use of the property.

The first, second and third assignments of error are denied.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

Two of the design review standards that apply in the Landscape Management Combining Zone are DCC 18.84.080(B) and (C), which provide:

> "B. It is recommended that new structures and additions to existing structures be finished in muted earth tones that blend with and reduce contrast with the surrounding vegetation and landscape of the building site.
>
> "C. "No large areas, including roofs, shall be finished with white, bright or reflective materials. Roofing, including metal roofing, shall be nonreflective and of a color which blends with the surrounding vegetation and landscape. * * *."

[7] Webster's Third New Int'l Dictionary, 1093 (unabridged ed 1981) includes the following definition of "horticulture:"

> "the cultivation of an orchard, garden, or nursery on a small or large scale: the science and art of growing fruits, vegetables, flowers or ornamental plants * * *."

Application of DCC 18.84.080(B) and (C) is limited by DCC 18.84.020, which provides that the requirements of the Landscape Management Combining Zone "shall not unduly restrict accepted agricultural practices."

The challenged decision includes the following discussion of DCC 18.84.020 and 18.84.080(B) and (C):

> "[T]he applicant originally indicated that the greenhouses would be covered with clear polyethylene sheeting. In a prior decision (LM 98-140), a Hearings Officer concluded that imposing the earth-tone recommendation and white-bright-roof prohibition on greenhouses used for 'the transmission of light for growing plants, trees, vegetables or crops' would impermissibly restrict agricultural practices. Staff, following the Hearings Officer's decision in LM 98-140, concluded that the greenhouses covered with clear sheeting must be used strictly for agricultural uses, and not for storage or any other non-agricultural use. Staff concluded that any greenhouse used for other purposes, such as storage, would be subject to the earth-tone recommendation and to the prohibition against white, bright, reflective materials.
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> "In response to the objections raised by opponents, the applicant's attorney indicated at the public hearing that the applicant would cover the greenhouses with dull, light green visqueen sheeting, rather than the clear polyethylene to reduce glare and visability. The applicant further testified that the only proposed use for the greenhouses was for the production of plant material.
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> The Hearings Officer finds that while the proposed light-green visqueen sheeting will still be somewhat reflective, it will be less so than the clear polyethylene originally proposed and will reduce contrast to the maximum extent practicable while still allowing the greenhouses to serve their intended purpose. The Hearings Officer further adheres to the rationale of the previous decision, LM-98-140, in which that Hearings Officer balanced the application of the LM criteria against the prohibition on undue restriction of agricultural practices found at 18.84.020 to find that the LM provisions should not be applied in such a way as to defeat the fundamental components of an accepted agricultural practice. In this case (as in LM-98-140), since the greenhouses must be somewhat reflective to properly transmit light and perform their function, the prohibition on reflective materials must be balanced against the prohibition on undue restriction of agricultural practices. Therefore, the Hearings Officer finds that the proposal to finish the greenhouses with the light-green visqueen sheeting represents the appropriate balance between the applicable provisions and reduces contrast to the maximum extent practicable." Record 53-54.

We understand the hearings officer to have concluded that the light-green visqueen covering that intervenor proposes to use for the greenhouses minimizes glare as much as feasible without unreasonably interfering with the functionality of the proposed greenhouses. The hearings officer concluded that while the greenhouses remain "somewhat reflective," and for that reason in violation of DCC 18.84.080(C), DCC 18.84.020 required that she nevertheless approve the proposal to cover the greenhouses with light-green visqueen sheeting.

Petitioners apparently dispute the hearings officer's conclusion that growing plants in greenhouses is an accepted agricultural practice. The hearings officer relied on a prior county decision that had reached that conclusion. Absent some argument or evidence that would call that seemingly reasonable conclusion into question, which petitioners do not cite or provide in their petition for review, we reject petitioners' contention that the hearings officer's decision must be remanded for a more detailed explanation for her conclusion that growing plants in greenhouses is an accepted agricultural practice.

Petitioners do argue that even if growing plants in greenhouses in an Exclusive Farm Use (EFU) zone is an accepted agricultural practice, it does not necessarily follow that growing plants in 29 greenhouses on the subject MUA-zoned property is an accepted agricultural practice in the MUA zone.[8] We fail to see how the number of greenhouses is legally significant. We also fail to see how the zone in which those greenhouses are located is legally significant. DCC 18.84.020 dictates that limitations required by the Landscape Management Combining Zone "shall not unduly restrict accepted agricultural practices." DCC 18.84.020 refers to accepted agricultural practices without limitation and does not require the county to limit its application to accepted agricultural practices in the particular zone in which the landscape management review is requested.

[8] The MUA zone is not an EFU zone.

Petitioners' fourth and fifth assignments of error provide no basis for reversal or remand of the challenged decision. The fourth and fifth assignments of error are denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners make two arguments under the sixth assignment of error. We consider them separately below.

A. Modified Application

Petitioners first contend that intervenor's decision to substitute light-green visqueen for the clear polyethylene greenhouse covering that was originally proposed constituted a change in the building design and therefore constituted a "modification" as DCC 22.04.020 defines that term.[9] Petitioners contend that DCC 22.20.55 requires that intervenor, as the applicant, must submit a modification application, pay a new application fee and restart the 150-day deadline for the county to render its decision.[10] Petitioners contend the county erred by failing to require that intervenor submit a modification application.

We question petitioners' contention that the change to light-green visqueen constitutes a modification of the "building design." However, we do not consider that question. Intervenor argues:

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[9] As relevant, DCC 22.04.020 provides:

> "'Modification of application' means the applicant's submittal of new information after an application has been deemed complete and prior to the close of the record on a pending application that would modify a development proposal by changing * * * the * * * building design * * * in a manner that requires the application of new criteria to the proposal or that would require the findings of fact to be changed. It does not mean an applicant's submission of new evidence that merely clarifies or supports the pending application."

[10] DCC 22.20.055(B) provides:

> "The Planning Director or Hearings Body shall not consider any evidence submitted by or on behalf of an applicant that would constitute modification of an application (as that term is defined in DCC 22.04) unless the applicant submits an application for a modification, pays all required modification fees and agrees in writing to restart the 150-day time clock as of the date the modification is submitted. * * *"

> "The record indicates [petitioners] did not raise the issue of whether a modification application was required after applicant offered to use dull light green visqueen sheeting for the greenhouses. Failure to raise the issue set forth in [petitioners' sixth assignment of error] precludes the Land Use Board of Appeals from considering this issue." Intervenor-Respondent's Brief 17.

Petitioners do not respond to intervenor's waiver argument. Because petitioners do not contend that they raised this issue below and offer no reason why they might be excused from the statutory requirement that they do so, we reject this subassignment of error.

B. Failure to Introduce a Sample of the Green Visqueen

Petitioners contend that intervenor did not submit a sample of the light-green visqueen that he proposes to use to cover the greenhouses. Petitioners argue:

> "Opponents' exhibits demonstrate that notwithstanding several different materials that may be used for plastic roofed greenhouses, all result in bright, reflective, glaring structures. Intervenor's statement that he would substitute light green visqueen is not evidence of the absence of large areas [of] the prohibited light and bright characteristics. In fact the hearings officer found that the substituted material only mitigated reflectivity and glare 'somewhat.' * * * The proposed use still relies on the use of large areas of glaring, bright, reflective materials. * * *" Petition for Review 17-18.

It is not clear whether petitioners are challenging the hearings officer's determination that the light-green visqueen will reduce the glare and be less reflective than the originally proposed clear polyethylene covering. If that is their argument, it is not sufficiently stated or developed.

It may be that petitioners' argument under this part of the sixth assignment of error is that a sample of the light-green visqueen is necessary to support a county finding that such a covering is not reflective. That argument is likely meritorious; but it is irrelevant. As petitioners recognize, the hearings officer did not find that the visqueen is *not* reflective. Instead the hearings officer found it is *less* reflective than the covering the intervenor originally proposed. As we have already noted, we do not understand the hearings officer to have found that the light-green visqueen would be "nonreflective," as DCC 18.84.080(C) requires. Instead, the hearings officer found that DCC 18.84.020 requires that the hearings

officer approve the application, notwithstanding the proposed somewhat reflective light-green visqueen covering, to avoid "unduly restrict[ing] accepted agricultural practices." Petitioners fail to explain why a sample of the light-green visqueen is necessary to support the finding that the county actually adopted. Neither do we understand petitioners to argue that there are nonreflective greenhouse coverings available that would both permit the greenhouses to function as such and satisfy DCC 18.84.080(C).

The sixth assignment of error is denied.

The county's decision is affirmed.[11]

[11] Both intervenor and the county include requests for an award of attorney fees in their briefs. ORS 197.830(15)(b) sets a relatively low "probable cause" hurdle that arguments must clear to avoid an award of attorney fees and a corresponding high hurdle for parties who seek an award of attorney fees under that statute. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997). Neither intervenor nor the county presents any argument explaining why they believe "no reasonable lawyer would conclude that any of the legal points asserted on appeal possessed legal merit." *Contreras v. City of Philomath*, 32 Or LUBA 465, 469 (1996). If intervenor and the county believe petitioners' assignments of error fail to clear the relatively low hurdle that petitioners must clear to avoid an award of attorney fees, they may submit a motion requesting an award of attorney fees as provided by OAR 661-010-0075(1)(e) and ORS 197.830(15)(b) and explain why they believe petitioners' arguments are frivolous. Unless and until they do so, their requests for an award of attorney fees are denied.